

***United States Court of Appeals
for the Second Circuit***



**INTERVENOR'S
BRIEF**

Nos. 77-4057 et al.

IN THE
United States Court of Appeals

FOR THE SECOND CIRCUIT

Nos. 77-4057, 77-4067, 77-4068, 77-4073, 77-4074, 77-4075

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, INTERNATIONAL BUSINESS MACHINES CORPORATION, SECURITIES INDUSTRIES AUTOMATION CORPORATION, AERONAUTICAL RADIO, INC., AIR TRANSPORT ASSOCIATION OF AMERICA, TELENET COMMUNICATIONS CORPORATION, *Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,
Respondents,

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
Intervenors.

On Petition for Review of Orders of the
Federal Communications Commission

BRIEF OF
AMERICAN TRUCKING ASSOCIATIONS, INC.
SUPPORTING INTERVENOR

JEREMIAH COURTNEY
ARTHUR BLOOSTON
PHILIPS B. PATTON
2120 L Street, N. W.
Washington, D. C. 20037
Attorneys for
American Trucking Associations, Inc.

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Intervenors.

On Petition for Review of Orders
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Brief of
American Trucking Associations, Inc.
Supporting Intervenor

STATEMENT OF ISSUES PRESENTED

The American Trucking Associations, Inc. ("ATA") has intervened in this proceeding in support of the Federal Communications Commission's ("FCC" or "Commission") Report and Order ("R&O") in Docket No. 20097, adopted July 1, 1976, 60 FCC 2d 261 (J.A. 28-148) and the Commission's Memorandum Opinion and Order ("MO&OR") on reconsideration, adopted January 5, 1977, 62 FCC 2d 588 (J.A. 152-172) challenged by the petitioners. These orders under review are hereinafter sometimes referred to as the "Sharing and Resale Orders." The issues presented for review to which ATA will address itself in this brief are as follows:

1. Whether, considering their impact, the Sharing and Resale Orders of the FCC under review are orders covered by the "prescription" provisions of § 205(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 205(a).

2. Whether the Commission employed the proper procedure for evaluating and whether it correctly evaluated in its Sharing and Resale Orders the consequences of eliminating existing tariff restrictions on sharing and resale of private line services.

3. Whether the Commission correctly concluded and held that the "single customer" status afforded to the air transportation industry through Aeronautical Radio, Inc. ("ARINC"), but not available to the trucking industry, was unjustly and unreasonably discriminatory.

4. Whether the Commission correctly held that sharing of the actual cost and use of facilities on a non-profit basis does not constitute common carriage.

COUNTERSTATEMENT OF THE CASE

The Sharing and Resale Orders under review arise from a proceeding initiated by the Commission in 1973 as a result, among other things, of a complaint (J.A. 177-239) filed by ATA against American Telephone & Telegraph Company ("AT&T") for the latter's refusal to provide the trucking industry with single customer status accorded to the air transportation industry. American Trucking Associations, Inc. v. AT&T, Docket 19746, 41 FCC 2d 2 (1973), J.A. 37. The proceeding in Docket 19746 was merged into and consolidated with the proceeding initiated by the Commission in 1974 by a Notice

of Inquiry and Proposed Rule Making, Docket 20097, 47 FCC 2d 644, J.A. 21, which provided for three rounds of written comments and culminated in the orders under review (J.A. 12-27).

ATA is a national trade association of the motor carrier industry. As such ATA has participated in this docket and in previous Commission proceedings to attempt to secure, for the benefit of individual motor carrier companies, the right reasonably to be served by interstate communications common carriers on a non-discriminatory basis, particularly as compared to trucking industry competitors -- the railroads and the airlines.

ATA supports the lawfulness of the Sharing and Resale Orders (J.A. 28-148 and 152-172) which are challenged by the petitioners. It is necessary to review the Commission's previous sharing orders concerning Shared Telpak to place the current Sharing and Resale Orders in proper perspective.

Trucking industry companies were large users of Shared Telpak Service, which communications service offering was found to be unlawful in an FCC Decision (Shared Telpak

Decision) adopted June 10, 1970: In th Matter of Telpak Sharing, Docket No. 17457, 23 FCC 2d 606 (1970).

The Shared Telpak Decision was affirmed in part, reversed and remanded in part, by this Court: AT&T v. FCC, 449 F.2d 439 (2nd Cir. 1971). Shortly thereafter the Commission issued its Decision and Order on Remand, 31 FCC 2d 674 (1971). American Telephone & Telegraph Company (AT&T) and Western Union (WU) were found to be unlawfully discriminating between customers because "The sharing of Telpak rates...allows certain enumerated customers...to group their private line communications requirements together for purposes of lowering their effective rate[s]...." Accordingly it was ordered by the FCC that AT&T and WU file tariffs "eliminating the aforementioned unlawful discrimination found to exist in the Telpak sharing provisions." Id at 675. AT&T has never complied with the Order on Remand, although it was affirmed by this Court. NAMBO v. FCC, 460 F.2d 561 (2d Cir. 1972). Aeronautical Radio Inc. (ARINC) members and certain other favored user groups have never been required to terminate their sharing of Telpak and other service offerings.^{1/}

^{1/} In NAMBO v. FCC, 460 F.2d 561 at 567 this Court conceded that "NAMBO and ATA may well be correct in alleging unlawful discrimination under these conditions."

AT&T filed its tariff revisions in response to the Order on Remand to become effective on December 12, 1971. These revisions had the effect of terminating sharing of Telpak or other communications facilities by trucking industry members and certain other businesses, while permitting continued sharing of Telpak and other communications services by air transportation industry members and many other significant customer groups. This was accomplished by way of tariff exemptions for the air transportation industry and others contained at AT&T Tariff FCC No. 260, paragraph 2.2.1. See NAMBO v. FCC, 260 F.2d 561 at 576.

ATA appealed the FCC Decision and Order on Remand to this Court, pointing out the trucking industry competitive disadvantage and the manifest unlawful discrimination created by the FCC-AT&T actions. This Court seemed to sympathize with the plight of the motor carrier industry and suggested a remedy:

The petitioners claim that the FCC has "magnified the unlawful discrimination found to exist" by allowing the carriers to abolish all Telpak sharing for them while permitting their competitors the airline industry, to share Telpak facilities under a separate tariff. AT&T Tariff, F.C.C. No. 260 ¶2.2.1 provides that air carriers may be treated as a single customer through "an aeronautical communications company licensed under the Aviation Services rules of the Commission to operate stations in the aeronautical mobile and fixed services." NAMBO and ATA may well be correct in alleging unlawful discrimination under these conditions. It seems to

us, however, that their remedy lies in challenging ¶ 2.2.1 before the Commission, rather than in the reinstatement of the shared Telpak provisions which the Common Carrier Bureau Chief, the FCC, and this Court have all found to be unlawful. Id. at 567.

ATA followed the Court's suggestion. On June 7, 1972, ATA filed its complaint at the FCC against AT&T (J.A. 177-205). That ATA complaint was amended on September 1, 1972 (J.A. 206-239). This complaint constituted one of the filings which triggered an FCC investigation assigned FCC Docket No. 19746, supra. Thus, the latter was the genesis of the Docket No. 20097 proceedings which are herein under review.

AT&T Tariff FCC No. 260 revision materials which were forwarded to the FCC by AT&T on March 23, 1977, with Transmittal No. 12715 (Exhibit A) in compliance with the Docket No. 20097 orders here under review are scheduled to become effective on June 21, 1977, unless stayed by court order. Thus, on and after June 21, 1977, members of the motor carrier industry should have equal communication channel sharing privileges with their industry competitors. These are privileges which the motor carrier industry has been denied ever since Shared Telpak Service was withdrawn from small business users in 1971. The air transport

industry, the securities industry, corporate conglomerates, the government and others have enjoyed full sharing privileges of Telpak and other services during the intervening six years. In fairness and equity, as well as by law, the Commission's orders under review should be affirmed. The air transport industry will continue to enjoy its sharing privileges when the FCC rules contained in the orders under review are affirmed. The difference will be that members of small companies in other industries will be permitted to share facilities with each other also.

AT&T is essentially correct in characterizing this proceeding as "a duplication, on a broader scale, of the first Telpak sharing case." (AT&T Brief, n. 20). AT&T's present sharing rules discriminate "on a broader scale." The unlawful and substantial price discrimination to which AT&T has been subjecting motor carriers vis-a-vis their competitors, by refusing to permit ATA members to be treated as single customers, as ARINC members are treated, resulted directly from the AT&T lack of full response to the Telpak sharing Order on Remand. See J.A. 36-37. While it ostensibly eliminated the Shared Telpak Service rate discrimination, AT&T deliberately perpetuated that precise discrimination and other discrimination with respect to ATA and its members vis-a-vis ARINC and its members. The price discrimination against ATA's members as compared to arrangements afforded to ARINC has meantime been costing the trucking

industry more than \$2,000,000.00 per month.^{2/} A growing number of very large categories of favored customer groups in addition to ARINC members have been afforded unlimited sharing privileges by being classed as "single users."^{3/} Five years after ATA complained to the FCC of the Section 2.2.1 discrimination, at this Court's suggestion, AT&T now asks this Court to permit it to continue to avoid regulation of its unlawfully discriminatory sharing privileges for another period of several years, by declaring FCC Docket No. 20097 orders unlawful, for procedural reasons. That would be a most unfair and unreasonable fate for this complex litigation which has already been going on for so many years. AT&T's petition for further procedurally dilatory action should therefore be denied. AT&T has never complied with the Commission's Order on Remand of the Telpak Sharing Cases at 31 FCC 2d 674, 675 which required it to eliminate the unlawful discrimination then found to exist. It is time it did so. A short and conclusive answer to AT&T's multiple arguments that the Docket No. 20097 orders are unlawful because the FCC held no hearings in compliance with Section 205(a) is for the Court to view the orders in Docket No. 20097 "as a device for enforcing

^{2/} Comments of American Trucking Associations, Inc. filed December 11, 1974 Docket 20097. Paragraphs 41-42 (J.A. 311-367)

^{3/} The current form of AT&T Tariff FCC No. 260, para. 2.2.1, containing the provisions which the Court previously recognized "may well be" unlawfully discriminatory (460 F.2d at 567) is shown at Exhibit B.

previously articulated responsibilities, and not as an independent proceeding." The Third Circuit so reasoned to dispose of a somewhat similar AT&T dilatory argument that there was a separate hearings requirement in Bell Telephone Company of Pennsylvania v. FCC, 503 F.2d 1250, 1263 (3rd Cir. 1974), cert. 423 U.S. 886 (1975). Parallel reasoning could quickly dispose of AT&T's procedural arguments herein. AT&T arguments can also be disposed of by recognizing the differences between the impacts of the Docket No. 17457 and the Docket No. 20097 orders.

ARGUMENT

I. The Orders Under Review Were Not Section 205(a) Orders 4/

It is well established that the nature of an agency action is determined by the results which flow from the action, rather than by the label or characterization the agency may use to describe its intentions.^{5/} As this very Court has held, dealing with the same main parties, "[T]o determine whether rates have been prescribed the actual

4/ Section 205(a) of the Communications Act of 1934 as amended.

5/ B&ORR v. U S, 277 U.S. 291, 300, 48 S.Ct. 520, 72 L.Ed. 885 (1928); Houston Belt and Terminal Ry. v. U S, 153 F.Supp. 3, 7-8 (S.C. Tex. 1957), aff'd. 356 U.S. 23, 78 S.Ct. 560, 2 L.Ed.2d 578 (1958); Moss v. CAB, 430 F.2d 891 (1970); AT&T v. FCC, 449 F.2d 439, 451 (2nd Cir. 1971); AT&T v. FCC, 487 F.2d 864, 874 (2nd Cir. 1973).

impact of agency action and not its form is decisive." AT&T v. FCC, 487 F.2d at 874. ATA submits that, viewed in their proper context and perspective, the FCC Orders under review are not prescriptive in Section 205(a) terms. These Orders merely determined that the carrier's tariff prohibitions against sharing and resale of interstate private line communications services were unlawful, and required that future communications common carrier interstate tariffs shall not contain general restrictions on sharing or resale of private line services.

In review of the Commission's Docket No. 17457 Telpak Sharing Orders^{6/} this Court found that the Commission's Orders directing AT&T and Western Union to extend sharing rates to all private line customers were prescriptive. It does not follow, however, as AT&T argues, that the Commission's Orders in Docket No. 20097 directing all communications common carriers subject to the Commission's jurisdiction to file tariffs eliminating carrier restrictions on resale and shared use of private line services are a prescription. It will be necessary to examine the actual impact of the agency action in Docket No. 20097.

The FCC in its Docket No. 20097 Report and Order under review characterizes its actions as a prescription:

^{6/} AT&T v. FCC, 449 F.2d 439 (2nd Cir. 1971)

J.A. 58. This characterization is not dispositive of the prescription issue. What is dispositive of this issue is "[t]he actual impact of [the] agency action and not its form" to "determine whether rates [or practices] have been prescribed." AT&T v. FCC, 487 F.2d at 874.

II. It Was The Impact Of The Shared Telpak Orders Which Determined That They Were Prescriptive

This Court in considering the Shared Telpak Service orders devoted three pages of its Opinion to the "Prescription" problem, thoroughly explaining its reasoning. Reversal and remand of a portion of the Commission orders was based solely upon the prescription issue. The Court held that:

(a) The FCC had failed to find that unlimited sharing of Telpak would be a just, fair and reasonable practice, which finding was a jurisdictional requirement for the Commission to have made to prescribe rates under Section 205(a). AT&T v. FCC, 449 F.2d at 447.

(b) Nevertheless, the Commission had prescribed rates: "The impact of its order requiring unlimited sharing is to fix and prescribe rates for application to an enlarged group of customers; and since the lower Telpak rates are not now available to this enlarged group, the order in effect is equivalent to an order requiring a widespread rate reduction." Id. at 451.

The Commission's claim that it had dealt only with the practice of sharing was rejected by the Court.

This suggestion disregards the actual impact of the Commission's order. Although in form it may be directed to a practice, its impact is to fix or prescribe lower rates for a large group of private line customers who have not heretofore had the advantage of those rates. The courts have held that it is the actual impact of agency action and not its form that is decisive in determining the nature of the findings and evidence that are required to support the action. [Citations ommitted]. AT&T v. FCC 449 F 2d, note 12.

Thus, the true impact of the Commission actions in adopting the Shared Telpak orders was: (a) to require a continuation of "Shared Telpak Service," and (b) to require that such "service" be made available to all private line users. However, it must be remembered that there was in fact no such thing as a Shared Telpak Service. That so-called "service" was only a semantic device to give lower private line rates to certain users, as the "single user" category has been a replacement semantic device to give shared use rates to ARINC and a few others. The Commission explained at 23 FCC 2d 611, "Nor is the summary irrelevant and immaterial as it makes clear the actual nature of Telpak "sharing" as a euphemistic term for rate discrimination among private line users. There is no sharing of anything except a discriminatory [lower] rate." At 23 FCC 2d 647 it is shown that shared Telpak costs could be approximately one-third of regular channel costs, for customers permitted such "sharing." But there was no sharing in fact, there was only the lower rate.

The actual impact of the Commission's orders requiring unlimited Telpak "sharing" was to require that the lower "sharing" rates be made available to all private line users. There existed specific lower Telpak rates which were being enjoyed through "sharing," by a specific small group of customers. There existed a specific larger body of other private line users who were being charged higher rates. The end effect, the true impact, of the Commission's orders in Docket No. 17457 was to extend a specific lower rate to specific existing customers who did not already enjoy it. The communications facilities to be made available to particular customers by carriers before and after the FCC's Telpak Sharing orders were identical. No actual facility sharing was involved -- only extension of a new lower rate. The Court found this FCC action to be a rate prescription of a type requiring compliance with Section 205(a), and reversed the Commission only because the Commission had not complied with the finding requirements of Section 205(a).

It should be noted that the Commission had found Shared Telpak to be unlawfully discriminatory under Section 202(a) of the Act, and that upon review that finding was affirmed by this Court, AT&T v. FCC, 449 F.2d at 448.

After its Shared Telpak orders were reversed by this Court, the FCC reconsidered and issued its Order on

Remand, 31 FCC 2d 674 (1971). The Order on Remand was affirmed by this Court, NAMBO v. FCC, 460 F.2d 561 (1972). The impact of the Commission's Order on Remand was only to require the carriers to file new tariffs to eliminate the unlawful discrimination which the Commission had found to exist in the offering of shared Telpak services. Such impact -- a blanket requirement being placed on the carriers to eliminate unlawful discrimination found to exist -- is not an impact which requires compliance with Section 205(a), as is clearly shown by the fact that this Court affirmed the Order on Remand, NAMBO v. FCC, supra. The orders now under review also are merely a blanket requirement being placed upon the carriers to eliminate unlawful discrimination found to exist. Compliance with Section 205(a) was not required to issue the orders under review. NAMBO v. FCC, supra.

III. The Orders Under Review Are Only Part Of A Complex Regulatory Action

The Docket No. 20097, RM 1997, RM 2218 Orders, In the Matter of Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, which are herein specifically under review, include a Report and Order adopted July 1, 1976 (R&O) and a Memorandum Opinion and Order disposing of petitions for reconsideration adopted January 5, 1977 (J.A.152). The actual impact of these orders

cannot be ascertained or understood without considering also the history of Telpak rates and services and the near-simultaneous Commission actions taken in Docket No. 18128, In the Matter of AT&T Long Lines Department, Revisions of Tariff FCC No. 260, Private Line Services, Series 5000 (TELPAC). See Memorandum Opinion and Order in Docket No. 18128 adopted September 23, 1976 during the time the R&O in Docket No. 20097 was being reconsidered. Docket No. 18128 is frequently mentioned in the R&O under review, and is referred to in the MO&OR. The impact of the Commission's actions in Docket No. 20097 cannot be analyzed or understood separately from the impact of the Commission's actions in Docket No. 18128.

Intervenor ATA has been deeply involved in Docket No. 18128 since 1968, as it has been involved in Docket No. 20097 since 1972. The recent final orders in both dockets primarily impact Telpak rates and services, but have broader implications and effects. The discrimination involved in Telpak sharing was not eliminated in 1970 or 1971, because ARINC and other especially favored major customer groups were permitted to continue to share Telpak and all other telephone services, by virtue of their special classifications under AT&T Tariff FCC No. 260, para. 2.2.1. See Exhibit B. The justness and reasonableness of Telpak rates per se was not determined in the Telpak Sharing cases. See AT&T v. FCC, 449 F.2d at 452 and see NAMBO v. FCC, 460 F.2d

at 564. Then pending Docket No. 18128 was referred to and relied upon to by the Commission both in the Telpak Sharing Orders and in the Sharing and Resale Orders. Clearly, to determine the impact of the Docket No. 20097 orders under review, the near-simultaneous MO&O in Docket No. 18128 also must be considered.

Were the Court to hold at this late date, as AT&T urges it to do, that the Docket No. 20097 orders of the Commission which find that tariff prohibitions against customer sharing of private line services are unlawfully discriminatory and must be withdrawn from tariffs are prescriptions made without full opportunity for hearing, it clearly would glorify form over substance. AT&T is playing the numbers game (docket numbers) when it complains of lack of hearings concerning sharing. The Commission has now been studying Telpak and the related sharing problems, which Telpak illuminated and amplified, for well over ten years. AT&T has produced more or less a million words of evidence and briefing on the subject of Telpak and the sharing problems which resulted; including orally arguing the interrelated issues several times since May 19, 1967 when the Commission formally opened its first Telpak Sharing case docket. See Recommended Decision, Telpak Tariff Sharing, 23 FCC 2d 640 (1970).

The issues involved in regulating communications sharing and related rates and conditions of service are

admittedly difficult. There comes a time, however, when the responsible administrative agency must face the difficulties; make the decisions; demand carrier compliance; and eliminate gross and conspicuous private line sharing discrimination which has now been visited upon smaller communications users by AT&T for more than ten years past. Not only should the Commission face up to demanding carrier compliance with the 1971 order to eliminate sharing discrimination -- so should the courts. Intervenor ATA urges recognition of the wisdom of the United States Court of Appeals for the District of Columbia Circuit when, in Nader v. FCC, 520 F.2d 182 at 206 (D.C. Cir. 1975), it said: "There comes a point when relegating issues to proceedings that go on without conclusion in any kind of reasonable time frame is tantamount to refusing to address the issues at all -- and the result is a denial of justice.... Although the issues are complicated, we can find no justification for a delay of ten years." The Court continued: "[W]e foresee the breakdown of the regulatory process if the public and the regulated carriers must wait as long as ten years to have important issues decided."

IV. The Impact Of The Orders Under Review Is Not Prescriptive

The tariff changes required to be made to comply with the Commission's Docket No. 20097 orders under review were sent to the Commission by AT&T on March 23, 1977, to be

effective on June 21, 1977, in letter of Transmittal No. 12715 (Exhibit A).

The Commission's Docket No. 18128 Memorandum Opinion and Order of September 23, 1976, 61 FCC 2d 587, required AT&T to file tariff revisions terminating Telpak in its present form, 61 FCC 2d at 668. Such a tariff revision also was sent to the Commission by AT&T. On March 23, 1977, AT&T filed with the Commission tariff revisions to be effective on June 8, 1977, (Transmittal No. 12714 Exhibit C) terminating Telpak altogether.

The Commission's Docket No. 18128 MO&O also required that all AT&T rates be cost-based on a particular cost formula which differs from the formula which AT&T previously has used. The MO&O required that new rates be filed for all services by May 23, 1977, 61 FCC 2d at 668. The exact date on which the new rates will be filed is still in question since AT&T has asked for minor time extensions, but there is no question that the Commission has required and will insist that new rates be filed for all interstate service categories within the next few months, effective on a near-simultaneous basis with the lifting of private line sharing and resale restrictions.

In transmittal No. 12714 (Exhibit C) AT&T has withdrawn its Telpak offering and has not substituted any other bulk-rate offering. The Telpak service termination

was required by Commission orders made in a different docket from the one here under review. However, Telpak discontinuance is timed by AT&T to be effective in advance of AT&T's compliance with the Docket No. 20097 orders under review. Since AT&T will not be offering any private line bulk rates at the time tariff restrictions on private line resale and sharing are withdrawn, present customers cannot combine their needs on paper only (as was the case in Shared Telpak) and thereby achieve a rate reduction. The impact of the Docket No. 20097 orders cannot include the extension of lower rates for the same service to any person or group, as was the case with the Commission's Shared Telpak orders. It should be recalled that the Commission's Shared Telpak Service order was found to be a prescription because:

The impact of its order requiring unlimited sharing is to fix and prescribe rates for application to an enlarged group of customers; and since the lower Telpak rates are not now available to this enlarged group, the order in effect is equivalent to an order requiring a widespread rate reduction" AT&T v. FCC, 449 F.2d at 451. (emphasis added)

It will be recalled that the impact of the Commission's Shared Telpak orders required the lower Shared Telpak rates to be continued as well as to be extended to a new group of customers not previously so favored. The orders presently under review do not require any service or rate to be continued or require any lower rate to be extended to any users not now so favored.

AT&T's bulk rates which previously made possible the achieving of an automatic rate reduction through combining on paper the requirements of several small users for placement of bulk orders have been withdrawn. All AT&T interstate rates are to be adjusted to proper levels under new costing principles, near-simultaneously with the withdrawal of restrictions against sharing and resale of private line services. The carrier, in fact, has suffered no prescription in a Section 205(a) sense in the orders under review, irrespective of the language the Commission used. So far as the Docket No. 20097 orders under review are concerned, AT&T was left free to structure its charges and its conditions of service to suit its own purpose -- so long as it did not include a general prohibition against private line sharing and resale. AT&T has revised its tariffs to meet its own objectives and interpretations of the Commission's orders. See Exhibits A and C; and also see AT&T's petition to the FCC to investigate and suspend the Docket No. 20097 responsive tariffs of all other interstate carriers, Exhibit D. AT&T objects to other tariffs, which do not include certain selective regulations initiated by AT&T concerning sharing and resale of private line services which AT&T has incorporated into its revised tariffs filed as responsive to the Docket No. 20097 orders.

In its Brief to this Court in this matter AT&T has attempted to make much of the surface semantic similarity of

the Commission's earlier order requiring sharing of Telpak and its recent order requiring removal of restrictions against the sharing of all services. The similarity is semantic and cosmetic only. The impacts of the orders are dissimilar. The fact that the former action was a prescription does not lead at all to a conclusion that the latter action is a prescription. The earlier Telpak Sharing orders required the carriers to continue to offer a particular rate schedule and specifically to extend it to others not previously eligible to "share." However, the Commission had already made it perfectly clear that there really was no such thing as Telpak "sharing;" there was only a sharply lower rate schedule available to those who were permitted to use it.^{7/} The Docket No. 20097 Sharing and Resale Orders now under review merely require the carriers to discontinue their general prohibitions against the actual sharing of use of private line telephone services and facilities. Docket No. 20097 orders do not prescribe, continuation of any particular rate structure, nor do they result in any body of users being newly entitled to any more favorable rate structure. Nothing has been prescribed. On the contrary, something has only been prohibited, because it is unfair and unreasonable and unlawfully discriminatory.

^{7/} 23 FCC 2d at 611 and 646.

It is thus apparent that no hearings mandated by Section 205(a) were required for two reasons: (1) because Docket No. 20097 should be viewed as an enforcement proceeding to require the carriers at long last actually to eliminate the unlawful discrimination ordered eliminated in the Shared Telpak Order on Remand, and (2) because the orders under review do not prescribe rates or service conditions.

V. Sections 154(i) And (j) And Sections 201(b) And 202(a) Of The Communications Act Authorized The FCC Actions Under Review

The Commission has found the AT&T restrictions on private line shared use and resale (described at R&O para. 5, J.A. 31-32), and the single user provisions (described at J.A. 36), to be unjust and unreasonable and unlawfully discriminatory in terms of Sections 201(b) and 202(a) of the Communications Act, R&O at para. 6 (J.A. 32). Obviously a fundamental congressional purpose in enacting Sections 154(i) and (j) was to give to the Commission the authority reasonably promptly to act to correct unjust, unreasonable and unlawful conditions which it has found to exist. With respect to Section 4(j) the Supreme Court has held:

Congress was mindful not only of the ends of justice but also of the proper dispatch of the Commission's business, a matter not unrelated to achieving the ends of justice....

FCC v. WJR, 377 U.S. 265, 282 (1949)

A reasonable approach to the Commission's enforcement problems has been explained in Bell Telephone Company of Pennsylvania v. FCC, supra:

While we recognize that the Commission has previously extolled the utilization of adjudication hearings in §201 proceedings, we do not believe that this "prior practice" is as significant as is claimed by AT&T. The Commission's former policy of evaluating interconnection on a case-by-case basis was not predicated upon a belief that §201(a) required such a policy. Rather, it was developed as a matter of procedural policy, reflecting the Commission's view of the most efficacious and just method of administering interconnection petitions. In the absence of a statutory mandate, we see no reason to bind the Commission to this procedural policy. As technology develops and the field of communications changes, procedural, as well as substantive, policy must be flexible.

The court's comments are as applicable to Section 201(b) and 202(a) matters. Neither Section contains "a statutory mandate" requiring a particular type of information gathering proceeding.

IV. The Commission Properly Found That The Elimination Of Sharing And Resale Restrictions From Private Line Tariffs Was Required, After Taking Into Account A Reasoned Evaluation Of The Consequences Of Its Actions.

AT&T complains in its Brief, page 57, that "[T]he Commission rejected AT&T's economic impact study largely upon the basis of assumptions made by AT&T regarding customer behavior." ATA does not find reasonable support for such a conclusion in the commission's R&O. The AT&T study is discussed at J.A. 69. It dealt only with the possible effects of unlimited sharing and resale of Full Business Day WATS and Telpak. Such a study is of no evidentiary value whatsoever in this matter since Telpak has been eliminated and sharing of WATS was not required by the Commission's orders. The Commission's R&O obviously anticipated the withdrawal of Telpak service, since the decision in Docket No. 18128 which ordered that action was near-simultaneous with the orders under review. The Commission knew of course, as it considered the R&O under review, that Full Business Day WATS was not going to be shared. In short the AT&T study was in no way relevant to the issues considered and disposed of in the R&O. Its rejection, therefore, was of no consequence.

The Commission explained its reasoned evaluation as to the public benefits of the very limited expansion of resale and sharing of private line service it has required

at R&O para. 75-88, 60 FCC 2d 298-303. The Commission had considered ATA pleadings. In seeking single customer status ATA had explained to the Commission at length, in this record, the benefits which would flow to its members through non-profit sharing.^{8/} AT&T seeks to make much of the fact that only OTP of those entities who submitted reasoned comments in this docket advocated completely unlimited sharing and resale. What AT&T fails to note in its Brief, however, is that OTP's position was not adopted by the Commission. OTP advocated completely unlimited and unregulated sharing and resale of all telephone services, not just a relatively small expansion of long established private line, non-profit sharing; which is what the Commission ordered.^{9/}

AT&T's treatment of the OTP comments in its Brief, particularly its arguments concerning the fact that no other

^{8/} See Amended Complaint ATA v. AT&T (J. A. 206-239), Exhibit C, being a letter to AT&T from ATA explaining the trucking industry need for single customer status. See also Docket No. 20097 Comments of ATA (J. A. 314-317) para. 5-11.

^{9/} The record does not show what portion of the private line revenue comes from airlines, corporate conglomerates, the securities industry, electric power companies, the government and others already permitted to share private lines as "single users," but obviously it is a significant portion of the whole. The impact of the Commission's Docket No. 20097 orders was merely to make such sharing available also to other private line users. No resale was permitted by the Commission orders, since resale was held to be common carriage. Common Carriage is only permitted after a certificate under Section 214 of the Act has been granted.

party filing significant comments agreed with OTP, is highly misleading. Thus, at page 5, AT&T says that "[Only OTP] advocated the extreme action of unlimited resale and sharing of private line services...." At page 6 AT&T says "Even OTP acknowledged that unlimited resale and sharing of private line services could result in adverse consequences for carriers and the public." In truth, however, OTP did not advocate unlimited sharing and resale of private line services. OTP advocated unlimited sharing and resale of all common carrier communications services. There is a tremendous difference. Disagreements of other parties including ATA with OTP which AT&T noted, were not disagreements directed to a proposal for the moderate type of action which the Commission took. They were disagreements with a much more radical proposal: That all persons should be permitted to share or resell all services without any regulation. The Commission's orders under review are much more modest. They only permit persons engaging in non-profit sharing of private line services to escape regulation.

The Commission's reasoned evaluation of the consequence of its actions included an evaluation of single user provisions of Tariff FCC No. 260 at Appendix E, J.A. 127-140. The Commission shows that the federal government, state governments, stock exchange members, composite data service vendors, electric power utilities, corporate

conglomerates and the airlines industry all had full authority to share. These categories together obviously represent a very substantial portion of all the users of private lines. The Commission's actions only extended to other and generally smaller users a type of sharing privileges AT&T already was giving to its biggest customers.

VII. The Commission Did Not Err In Holding That It Was Unjust And Unreasonable To Provide Single Customer Status To The Air Transport Industry While Denying It To Others.

ARINC asks this Court to reverse the Commission's finding that an ARINC exemption from general prohibitions against private line sharing applicable to others, including the trucking industry, is unlawful. ARINC explains that if the general sharing prohibitions should be reinstated by reversal or remand of the orders under review, but ARINC's single customer status should not be reinstated, it would be in a very unfavorable position. ATA understands ARINC's concerns. ATA has been in that exact unfavorable position for the past five years. However, it is prima facie unfair and unreasonable to all telephone users, but to ATA members in a very special way, to have the air transport industry relieved of millions of dollars of costs each year which ATA members and the balance of the public must make up. It is a disappointment that ARINC did not lend its considerable legal talents and energies in support of the Commission's

orders, since it says that it agrees with the FCC's broad-scale allowance of sharing privileges through non-profit intermediaries. ARINC's Brief, p. 2.

The Commission has fully justified its rejection of special single customer status for ARINC. See R&O, Appendix E, J.A. 127-140. First the Commission showed that AT&T Tariff FCC No. 260, para. 2.2.1 does discriminate, i.e., it treats persons similarly situated differently. Then the Commission showed that "single customer" groups secured lower rates, through use of Telpak sharing, and also that single user status "allows specific user groups -- such as airlines, stock exchange members, and electric power pools -- to enjoy the administrative convenience resulting from the purchase of communications services in conjunction with other members of the group."^{10/} The Commission then examined the various arguments which had been advanced to

^{10/} The "administrative convenience" of sharing is an important matter that has nothing to do with rates, but which does effect customer costs. For example, three trucking firms may each have need for a leased line Boston to New York; each with a light communications load. Operationally one shared circuit would serve all three. But trucking companies, not being from a "single customer" group, are denied the administrative right to order and use a facility jointly. Each company now must rent a full channel, for administrative reasons -- causing conspicuous waste of scarce resources. But more revenue for AT&T. After June 21, 1977 three or more trucking companies will be able to share the use and the cost of one channel, unless this Court reverses the Commission.

justify the discrimination, and found no adequate justification. Therefore, the Commission properly concluded that the discrimination was unjust and unreasonable.

In 1972 this Court observed that NAMBO and ATA may well be correct in alleging unlawful discrimination under these conditions.^{11/} In 1972 in its Complaint against AT&T (J.A. 179-180) intervenor ATA alleged:

8. That the motor carrier industry competes with the airlines for the transportation of freight and that this competition is growing in intensity as the freight carriage capacity of aircraft continues to increase.

9. That the inability of the motor carrier industry to group their private line requirements in a manner similar to that permitted the airlines under the aforesaid single customer tariff regulation, because of the refusal of AT&T to extend the single customer treatment to the motorcarrier industry (as more fully alleged below) constitutes an unlawful discrimination and preference in favor of the air segment of the transportation industry and has damaged the motor carrier industry.

10. That the discriminatory single customer provision of paragraph 2.2.1(G) of AT&T Tariff FCC No. 260 was included in the tariff by Transmittal No. 10537 dated July 31, 1969, effective September 1, 1969, as a result of negotiations between ARINC as representative of the airlines and Defendant conducted during the pendency of the Shared TELPAK proceeding. See Exhibit A, a copy of a letter dated June 26, 1969 from ARINC to Defendant.

11. That the undertaking by Defendant during the pendency of the Shared TELPAK proceeding

^{11/} NAMBO v. FCC, supra.

of negotiations with ARINC on behalf of the airlines, while ARINC and the airlines were parties to the Commission's proceeding in Docket 17547, constituted a deliberate act on the part of Defendant of according an unlawful preference for the air segment of the transportation industry and establishing an unlawful discrimination against the land segment of that industry.

In its Appendix E to the R&O, J.A. 140, the Commission has explained:

15. We have heretofore mentioned that the Truckers (and NAMBO) contend that they also should be granted single customer status.... they contend that as a matter of public policy we should find tariff provisions lawful which work to equalize competition between air and surface carriers. Because we find ARINC's single customer status with respect to Telpak to be unlawful, and we extend the benefits of resale and sharing to all customers, we need not address this argument.

ATA submits that, should the Court reverse the Commission's orders finding general prohibitions against non-profit sharing of private line services unlawful, as AT&T asks it to do, the Court should not then reverse the findings of Appendix E, as ARINC asks it to do, unless the Court undertakes at that same time also to correct the prima facie unlawful discrimination against the trucking industry which is mentioned in NAMBO v. FCC, supra, and which is documented in ATA's Complaint and Amended Complaint (J.A. 177-239). The Court could do this by ordering the Commission to require AT&T forthwith to extend the same sharing privileges to ATA as it extends to ARINC.

VIII. Customer Sharing Of The Use Of Telephone Private Line Facilities Is In The Public Interest; Non-Profit Sharing Is Not Per Se Common Carriage Subject To Commission Regulation; The Commission Properly Reconciled The Conflicting Viewpoints

IBM argues that neither non-profit sharing nor for-profit resale of telephone service constitutes common carriage, and that in any event the Commission should forbear on a blanket basis any regulation as to resale of service.

United argues that both non-profit sharing and for-profit resale are common carriage and that the Commission has an obligation to regulate them both.

Telenet argues that failure of the Commission to specify at this time a set of enforcement procedures to prevent abuse of unregulated sharing by persons who are actually supplying for-profit services is reason to set aside and remand the orders.

The Commission properly evaluated and reconciled such cross currents, taking into account both public interest and legal precedent. Public interest considerations considered to be of decisional significance are detailed by the Commission at R&O paragraphs 75-88, (J.A. 78-83) including:

(a) Sharing and resale of private line services unlimited by carrier tariffs would create pressures on carriers to require them to price services so as to fully recover costs. Such pricing pressures carry a high Commission priority. See MO&O Docket No. 18128, supra.

(b) Private line networks dedicated to specialized uses will be better managed, if resale and sharing is permitted. This is a most significant advantage. See for example the statement of ARINC in its Comments, page 46 (J.A. 802).

Many services now provided by ARINC, or now in planning, could not practically be provided if the various air carriers individually were the customers for the services. (Emphasis added.)

See the statement of the Air Transport Association of America, Comments, page 12 (J.A. 868-9).

The availability of bulk communications services at reasonable rates already has greatly facilitated major improvements in all aspects of the airline industry's functions, and it has been a primary factor contributing to development of specialized personnel and specialized methods committed to more effective and more efficient performance of the airlines' missions. (Emphasis added.)

The trucking industry anticipates making the same type of major improvements in all aspects of its operations, once industry units are permitted to be treated as sharing customers, as was explained by ATA in its Response, page 17 (J.A. 1376).

These savings would permit the trucking industry to develop sophisticated communications/information systems to coordinate and control its operations. Systems to handle dispatching, administration, billing, safety, schedule, and shipment routing and tracing which are economical enough to use would allow the entire trucking industry, small as well as large companies, further to increase the efficiency of its operations, while also enhancing its ability to compete fairly with the airlines for freight shipments. The resulting greater productivity could lower the per unit cost of operation, which would benefit the shippers and hence the public at large.

It cannot be emphasized too strongly that, although the right to combine needs to secure Telpak bulk rates was important, so long as bulk rates were available, that was not the most important advantage of "sharing" or being treated as a "single customer." Operation of a comprehensive nationwide communications system, such as that which is operated by ARINC and intended to be operated by ATA is impossible unless it can be managed by someone. Exhibits E and F represent the ARINC nationwide networks and are reproductions of Figures 1 and 2 from ARINC Comments (J.A. 771-772). It can be understood that operation of such a network requires central control by some single ordering and managing entity. Unless AT&T permits unlimited non-profit sharing, or alternatively permits the trucking industry to be treated as a single customer, an industry communications network similar to the ARINC network is impossible. The discrimination practiced against ATA by AT&T has not merely been price discrimination, it has been discrimination which has deprived the trucking industry of the ability to operate

a nationwide communications network at any price. Elimination of such pervasive "administrative" discrimination being practiced against the trucking and other industries is highly in the public interest.

(c) Sharing and resale of private line services unlimited by carrier tariffs would encourage the development of a new "information handling" industry having a broader services base than either the present communications or the present data processing industry.

(d) Sharing and resale of private line services unlimited by carrier tariffs will create additional incentives for research and development.

(e) The existing carriers will benefit from business expansion brought about by sharing and resale of private line services unlimited by carrier tariffs.

The suggestion that non-profit sharing of the use of telephone facilities is common carriage per se simply cannot be supported. This very issue has recently been litigated. See NARUC v. FCC, 525 F.2d. 630 (D.C. Cir. 1976), cert. den. 425 U.S. 992 (1976). It is clearly the law that one is not a common carrier unless and until he holds himself out "indifferently to serve the user public." Id. at 644. Therefore, a person who shares the use of facilities with others may or may not be a common carrier depending upon his actions. A proposed per se definition

will not suffice. "The common law requirement of holding oneself out to serve the public indiscriminately draws...a logical and sensible line between [private and common]... carriers." NARUC v. FCC, supra, at 642.

The fears of Telenet and United that the Commission's actions and classifications may encourage unauthorized persons to act as common carriers are almost identical to the fears of the radio common carrier industry which were litigated by the National Association of Radiotelephone Utilities in NARUC v. FCC, supra. The Court held that the Commission need not speculate upon possible future rule violations. The Commission should meet regulatory problems when and if they occur. Id. at 644.

[W]e do not foreclose the possibility of future challenge to the Commission's classification, should the actual operation of SMRs appear to bring them within the common carrier definition. (Emphasis added.)

CONCLUSION

It has been shown that the orders under review are necessary at this time as an enforcement tool to secure carrier compliance with the Commission's Shared Telpak Order on Remand, 31 FCC 2d 674 (1971), requiring the carriers to eliminate Shared Telpak discrimination. Shared Telpak discrimination has never been eliminated. Shared Telpak was

not discontinued by AT&T as ordered, although it removed specific use of the words "Shared Telpak" from its tariffs. AT&T continued to extend Shared Telpak privileges and rates to certain large and favored customers: the government, the airline industry, the securities industry and others, by calling them "single users."

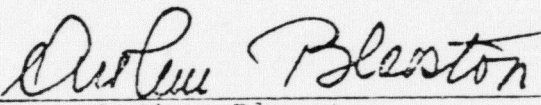
It has been shown that general prohibitions by carriers against sharing of private line services were properly found by the Commission to be unjust and unreasonable and in violation of Section 201(b) of the Act; and unjust and unreasonable discrimination in violation of Section 202(a) of the Act. The Commission's orders to eliminate general tariff prohibitions against sharing and resale are within its authority under Section 154(i) and (j) of the Act, and are lawful.

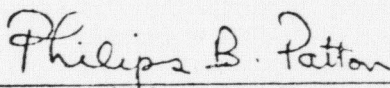
It has been shown that AT&T's arguments that the Commission did not comply with the hearing requirements of Section 205(a) of the Act are not relevant to the actions under review, since the impact of the Docket No. 20097 orders is not prescriptive in Section 205(a) terms.

It has been shown that the Commission properly considered the consequences of its orders and the public's interests, and that the orders should be affirmed.

Respectfully submitted,


Jeremiah Courtney


Arthur Blooston


Phillips B. Patton

Attorneys for
American Trucking Associations, Inc.

2120 L Street, N. W.
Washington, D. C. 20037
(202) 833-3050

May 18, 1977

C O P Y

EXHIBIT A

J.F. Healy
Administrator Rates and Tariffs

AT&T LongLines
32 Avenue of the Americas
New York, N.Y. 10013
Phone (212) 393-7277

March 23, 1977

Transmittal No. 12715

Secretary
Federal Communications Commission
Washington, D.C. 20554

Attention: Common Carrier Bureau

The accompanying tariff material is sent to you for filing in compliance with the requirements of the Communications Act of 1934, as amended, issued by the American Telephone and Telegraph Company, Long Lines Department, and bearing Tariff F.C.C. Nos. 260 and 267, effective June 21, 1977. This material consists of tariff pages as indicated on the following check sheets:

<u>Tariff</u> <u>F.C.C. No.</u>	<u>Check Sheet</u> <u>Revision No.</u>
260	1680th Page 1 764th Page 1.1
267	68th Page 1

This filing, under authority of Special Permission No. 8267 of the Federal Communications Commission, is being made in compliance with the Federal Communications Commission's Report and Order (F.C.C. 76-641) released July 16, 1976, as modified, in part, by the Commission's Memorandum Opinion and Order (F.C.C. 77-34) released January 12, 1977, which directed all common carriers subject to the jurisdiction of the Commission to file revised private line tariffs "eliminating restrictions on the resale and shared use of their services which are not consistent with these policies."

The revisions contained herein remove those restrictions. Specifically, this filing:

- 1 - Redefines the term "Customer." A customer may be a direct user of the service, a reseller for profit or an intermediary in a sharing arrangement.

EXHIBIT A

Federal Communications Commission

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- 2 - Deletes the term "Authorized User" and "Joint User" and establishes the term "User." A User may be a reseller's patron, or a sharer. All Users must be connected to, or have access to, the private line service to be used.
- 3 - Changes the "Use" regulations by
 - (a) stating that a private line service may be resold by an entity certificated by the Federal Communications Commission;
 - (b) stating that a private line service may be shared in a non-profit, long term arrangement;
 - (c) setting forth regulations to assure that private line service is not converted into Message Telecommunications Service, Wide Area Telecommunications Service, Local Exchange Service, or the equivalents thereof;
 - (d) permitting private line to be used as follows:
 - (1) Switched Voice Networks
 - Customer may communicate with all Users and vice versa.
 - A given User entity may communicate only with stations of the same User or of the customer.
 - (2) Non-switched voice or switched or non-switched non-voice
 - Customers and all Users may communicate with each other.
- 4 - Establishes a definition for "Switched Private Line Service" and modifies the existing definition of "Private Line."
- 5 - Modifies the "Connections" regulations by:
 - (a) stating the regulations under which a private line furnished to a Customer for resale may be connected to a private line furnished to a customer different from the reseller;
 - (b) specifying that common carriers who connect to telephone company Private Line service are responsible for minimum protection criteria and protective arrangements;
 - (c) reserving the right to file minimum protection criteria for those channels not presently covered.

- 6 - Deletes definitions of "Composite Data Service," "Composite Data Service Vendor," and "Patron."
- 7 - Deletes Joint Use Arrangements which are no longer required in a resale/sharing environment.
- 8 - Modifies the regulations pertaining to "Obligations of the Customer" to specify that the Customer is responsible for ordering all services, payment of all charges, compliance with all regulations and for all acts or omissions of any designated agent.
- 9 - Deletes existing regulations that restrict channel derivation on certain types of channels.
- 10 - Revises the regulations pertaining to "Payment Arrangements" to permit the Telephone Company to require deposits up to the minimum service period when the period exceeds one month.
- 11 - Changes the minimum service period for Series 7000 and 8000 service to six months in order to protect Telephone Company investment and to reduce churn.
- 12 - Requires that all Telephone Company-provided private line services on a private line network be furnished to the same customer.
- 13 - Changes the minimum service period for the interexchange channel for temporary service (Series 1000 through 4000), so that the minimum charge for temporary service is the same as the minimum charge for monthly service. This change is required to reduce the possibility of inappropriate use with a corresponding deterioration of the cost/revenue relationship for the private line service.
- 14 - Sets forth the video signal parameters for Series 7000 channels and clearly states that service standards, trouble reporting, testing and maintenance of Series 7000 channels are based on waveform test signals that simulate a television signal.
- 15 - Makes other changes as required for tariff clarity.

In accordance with the Commission's Memorandum Opinion and Order (F.C.C. 77-34) released January 12, 1977, resale and sharing regulations will not apply to Overseas service (except service to Hawaii, Puerto Rico, Virgin Islands, Guam, Midway or Wake Island) or to service which is connected to service extending to Canada, Cuba, or Mexico.

Federal Communications Commission

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The regulations contained in this filing reflect the withdrawal of Series 5000 (Telpak) filed concurrently with these tariff revisions under Transmittal No. 12714, dated March 23, 1977.

We do not view the revisions filed herein as requiring venue, cost or traffic data as set forth in Section 61.38 of the Commission's Rules.

AT&T's Comments, pleadings and affidavits filed with the Commission and the United States Court of Appeals for the Second Circuit, address a broad range of problems perceived as probably upon implementation of the Commission's decisions. The Tariffs enclosed, while in compliance with the Commission's decisions in Docket No. 20097, do not eliminate these problems. However, AT&T is prepared to seek appropriate solutions to problems as they arise.

AT&T believes that the enclosed tariff revisions are in full compliance with the principles and findings of the Commission's decisions in Docket No. 20097. If the Commission believes otherwise, or is uncertain as to this matter, AT&T requests the Commission to, on its own motion, suspend these tariff revisions for the full statutory period and conduct a hearing and investigation under Sections 201-205 of the Communications Act in order to enable the Commission, in accordance with Section 205(a) of the Act, to determine and, if necessary, prescribe what classifications, regulations or practices would be just, fair, reasonable and otherwise lawful.

Acknowledgment and date of receipt of this filing are requested. A duplicate letter of transmittal is attached for this purpose. All correspondence and inquiries in connection with this filing should be addressed to Mr. J. F. Healy, Administrator Rates and Tariffs, American Telephone and Telegraph Company, 32 Avenue of the Americas, New York, N. Y. 10013.

s/ J. F. Healy
Administrator Rates and Tariffs

Attachments:

Duplicate Letter

Tariff Pages

Copy of Letter and Pages sent to:
Commercial Contractor

C O P Y

AM. TEL. & TEL. CO. L. L. DEPT.
Act. Rates and Tariffs
32 Ave. of the Americas, New York, N.Y. 10013
Issued: January 10, 1977

TARIFF F.C.C. NO. 260
19th Revised Page 17
Cancels 18th Revised Page 17
Effective: February 10, 1977

PRIVATE LINE SERVICE

EXHIBIT B

2. REGULATIONS (Cont'd)

2.1 Undertaking of the Telephone Company (Cont'd)

2.1.6 Rates and Regulations Applicable to Portions of Service
Between the United States and Cuba and between the United
States and Alaska

- (A) The rates and regulations set forth in Tariff F.C.C. No. 2 of the Cuban American Telephone and Telegraph Company apply to the portion between Key West, Florida and Havana, Cuba of private line services for morse, teletypewriter, voice and audio transmission, between the United States and Cuba.
- (B) The rates and regulations set forth in Tariff F.C.C. No. 1 of RCA Alaska Communications, Inc. apply to the portion between the point of connection at or near the United States-Canada International Boundary or at earth stations at Greenbelt, Maryland, Point Reyes, California or Valley Forge, Pennsylvania and the service point in Alaska for private line services for teletypewriter, voice, data, audio and television transmission between the United States and Alaska.

2.1.9 Rates and Regulations Applicable to Setting up of Equipment
on Ships in Connection with Service Between the United
States and Ships of United States Registry

The rates and regulations set forth in (5) of Tariff F.C.C. No. 9 of the RCA Global Communications, Inc., apply for the setting up of equipment on the ship in connection with service between points within the United States and ships of United States registry on which the operation of the communications facilities is licensed to the RCA Global Communications, Inc.

2.2 Use

2.2.1 A private line service may be used for one or more of the purposes specified in (A) through (J) following. When a private line service is arranged for joint use the joint user shall be permitted to use such service in the same manner as the customer as specified in (A) through (I) following.

- (A) For the transmission of communications to or from the customer and relating directly to the customer's business.
- (B) For the transmission, to all stations simultaneously, of communications which relate directly to matters of common

Printed in U.S.A.

EXHIBIT B

interest to the interest to the customer and the authorized users when those connected to the service are all in the same general line of business.

- (C) For the transmission of communications relating directly to the business of a subsidiary corporation over which the customer services control through the ownership of more than 50% of the voting stock.
- (D) For the transmission of communications to or from any station on a service furnished to a Department or Agency of the United States Government when the head of the Department or Agency, or his duly authorized representative, notifies the Telephone Company in writing that the use is intended only for official United States Government business.
- (E) Where the customer is an organized stock or commodity exchange, for the transmission of communications to or from an exchange member located on the floor of such exchange and relating directly to the business of the member.
- (F) Where the use of the service relates to coordination or exchange of electrical pooled power, for the transmission of communications between any two or more stations of such service or similar services furnished to others who are parties to the coordinating or exchange arrangement.
- (G) For the transmission of communications to, from, within and between air carriers, where the customer is an aeronautical communications company licensed under the Aviation Services rules of the Commission to operate stations in the aeronautical mobile and fixed services.
- (H) For the transmission of communications to or from any station on a service furnished to the United States Postal Service for its use in the provision of its Facsimile Mail Service.
- (I) For the transmission of communications of a state or local government agency where the service is ordered for such agency by the United States Government pursuant to the Intergovernmental Cooperation Act of 1968.
- (J) Where the customer is a composite data service vendor, for the transmission of switched data (non-voice) communications for its patrons when such communications relate directly to the business of such patrons, for communications over the private line service in accordance with (A) preceding, and, additionally, for composite data service or hybrid data processing service, as defined in Part 64.702 of the Federal

Communications Commission's Rules and Regulations, rendered by a patron of the customer. All other forms of collection, transmission or delivery of communications for others is prohibited.

Joint use arrangements are specified in 3.1.5 following.

2.2.2 Private line service shall not be used for an unlawful purpose.

2.2.3 Private line service shall not be used for any purpose for which a payment of other compensation shall be received by either the customer or any authorized or joint user, or in the collection, transmission, or delivery of any communications for others, except as provided in 2.2.1(F), 2.2.1(G), 2.2.1(H) and 2.2.1(J) preceding. This provision does not prohibit an arrangement between the customer and the authorized or joint users to share the cost of the private line service, nor does it prohibit the use of Type 2006, 5206 or 8206 channels by a communications common carrier in the rendition of a public telegram message business.

C O P Y

EXHIBIT C

J. F. Healy
Administrative Rates and Tariffs

AT&T LONG LINES
32 Avenue of the Americas
New York, New York 10013
Phone (212) 793-7277

March 23, 1977

RECEIVED APR 4 1977

Transmittal No. 12714

Secretary
Federal Communications Commission
Washington, D. C. 20554

Attention: Common Carrier Bureau

The accompanying tariff material is sent to you for filing in compliance with the requirements of the Communications Act of 1934, as amended, issued by the American Telephone and Telegraph Company, Long Lines Department, and bearing Tariff F.C.C. Nos. 258 and 260, effective June 8, 1977. This material consists of tariff pages as indicated on the following check sheet:

Tariff F.C.C. No. 258 - 96th Revised Page 1

Tariff F.C.C. No. 260 - 1679th Revised Page 1
763rd Revised Page 1.1

This filing provides for the cancellation of Series 5000 (Telpak). This is consistent with the Commission's Memorandum Opinion and Order in Docket No. 18128, released October 1, 1976 (FCC 76-806), which requires that Telpak be terminated by June 8, 1977. This filing is being submitted today along with the filing under Transmittal No. 12715 which (effective June 21, 1977) removes sharing and resale restrictions from Tariff F.C.C. Nos. 260 and 267, so that customers will not proceed under the false assumption that they may avail themselves of a Bell bulk service which can be shared or resold. It is our view that Telpak cannot exist in a resale and sharing environment.

RECEIVED APR 5 1977

EXHIBIT C

Federal Communications Commission

-2-

In order to ease tariff administration, some references to Series 5000 in the general regulations of Tariff F.C.C. No. 260 will be eliminated under Transmittal No. 12715 rather than in this filing, and references to PIC 5 in the list of Rate Centers and Central Offices tariff (F.C.C. No. 264) will be deleted at a later date.

We are also filing today an application for special permission to refile certain Series 5000 services which are currently offered exclusively under Series 5000; namely, 2-0.4-kilohertz wideband data service, special wideband terminal equipment used by the U.S. Government, and voice-grade extension service connection arrangements.

In addition, we are filing under separate Transmittal No. 12716 revised rates for Series 2000 and 3000 channels to be effective coincident with the termination of Telpak.

Analyses are underway to determine the effect on Series 1000 service of withdrawing Series 5000 service, including the telegraph equivalent-Type 5100. Analyses are also underway for the entire Series 8000 offering. When these analyses are completed, rate adjustments may be required.

This filing also contains minor text revisions.

Appropriate steps are being taken to notify affected customers of the major tariff revisions in this filing.

Acknowledgment and date of receipt of this filing are requested. A duplicate letter of transmittal is attached for this purpose. All correspondence and inquiries in connection with this filing should be addressed to Mr. J. F. Healy, Administrator Rates and Tariffs, American Telephone and Telegraph Company, 32 Avenue of the Americas, New York, N. Y. 10013.

/s/ J. F. Healy

Administrator Rates and Tariffs

Attachments:

Duplicate Letter

Tariff Pages

Copy of Letter and Pages sent to:

Commercial Contractor

EXHIBIT D

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Regulatory Policies Concerning Resale	)	Docket No. 20097
and Shared Use of Common Carrier Services	)	
and Facilities	)	
	)	
Revisions to Tariffs	F.C.C. Nos.)	Transmittal No.
	)	
AMERICAN SATELLITE CORPORATION	1)	38
GRAPHNET SYSTEMS, INC.	1)	29
MCI TELECOMMUNICATIONS CORPORATION	1)	65
RCA AMERICAN COMMUNICATIONS, INC.	1&4)	27
RCA ALASKA COMMUNICATIONS, INC.	1)	100
SATELLITE SERVICES, INC.	1)	2
SOUTHERN PACIFIC COMMUNICATIONS CO.	2)	92
UNITED STATES TRANSMISSION SYSTEMS,	1)	17
INC.	)	
THE WESTERN UNION TELEGRAPH CO 254,257,261)		7254
MAINE MICROWAVE, INC.	1)	8
MISSISSIPPI VALLEY MICROWAVE	1)	3
PENN SERVICE MICROWAVE COMPANY	1)	4
SERVICE ELECTRIC COMPANY	1)	7
WESTERN MARYLAND COMMUNICATIONS,	1)	5
INC.	)	

PETITION TO INVESTIGATE AND SUSPEND
(To Be Acted On By The Commission)

American Telephone and Telegraph Company (AT&T),
pursuant to Section 204 of the Communications Act, respectfully requests that the tariff revisions filed by other common carriers by the transmittals listed above and purporting to comply with the decisions of the Federal Communications

Commission in Docket No. 20097 be suspended for the full statutory period, during which time an investigation thereof should be conducted. In support thereof AT&T respectfully states as follows:

1. In response to the Commission's Report and Order (60 F.C.C.2d 261) (Report and Order) in the Resale and Sharing case, Docket No. 20097, as amended in part by its Memorandum Opinion and Order (FCC 77-34, released January 12, 1977) (Memorandum Opinion), AT&T and other carriers filed revisions to their private line tariffs on March 23, 1977, to be effective on June 21, 1977. Although the tariff revisions filed by carriers other than AT&T vary in detail and complexity, one characteristic is common to all of these tariff revisions: none explicitly requires that resold or shared services not be used to create services which are the equivalent in their essential features to public message services. Thus, the tariffs filed by the other carriers are too vague and general to permit a determination as to whether they comply with the Commission's orders which proscribe the creation of such networks, and thus whether they adequately inform the public. In these circumstances, an investigation is required to assess the congruence of the newly filed tariff revisions with the letter and spirit of the Commission's orders, and, if necessary, appropriate regulations should be prescribed upon the completion thereof.

2. One of AT&T's principal concerns in the Resale and Sharing proceeding has been the possibility that the Commission's determinations would have an adverse economic impact on the public message services to the detriment of the general body of ratepayers and could open the door to the unauthorized provision of MTS or WATS services by others. On several occasions AT&T and others expressed their concern to the Commission that its decisions in this matter were subject to misuse or misinterpretation.* Indeed, the Commission itself has recognized that different parties had placed "varied interpretations" on the Commission's Report and Order.** Throughout this proceeding the Commission has also emphasized its long standing concern that competitive services should not adversely impact public message services, and has recognized the potential that resold and shared private line services have to do so. Thus, the Commission firmly stated that its decisions should not "... encompass the conversion of that private line service into MTS or the equivalent thereof."*** In its Decision on reconsideration the

* See, e.g., AT&T Comments; AT&T Petition for Reconsideration, paras. 42-47.

** In the Memorandum Opinion and Order (FCC 76-848, released September 14, 1976) in Docket No. 20097, the Commission stated (61 F.C.C.2d 70 at 71): "In reviewing the motions [for Stay] before us, it is evident that there are varied interpretations of the policies set forth in the Report and Order."

*** Report and Order, para. 64.

Commission reiterated its position and stated that ". . . distinctions between private line service and MTS and WATS which were cited in Execunet and related decisions clearly govern."*

3. However, the tariff revisions filed by other carriers, while ostensibly complying with the Commission's Report and Order regarding the removal of existing resale and sharing restrictions, do not treat adequately or with sufficient specificity this critical requirement that the private line character of the service be maintained and that "the conversion of that private line service into MTS or the equivalent thereof" be prohibited. Moreover, the vague and general tariff revisions filed by the other carriers raise the uncertainty the Commission attempted to eliminate. Thus, customers may be misled and wrongly assume, based on these tariff regulations, that they may use services obtained under these tariffs in a manner which contravenes the Commission's intentions expressed in this docket and others and, indeed, exceeds the lawful authority of the carriers to provide such service. Absent any effective tariff restrictions to prevent misuse and the conversion of resold or shared private line service into MTS and WATS, the danger is present that services of other carriers may be offered or utilized in a manner that will compete directly with and divert traffic and revenues from these public

* Memorandum Opinion, para. 26.

message services. The Commission has recently held that such competition and diversion are not a permissible aspect of authorized private line services.*

4. As an example of the type of unlawful system configuration which could be created unless the vagueness inherent in the tariffs filed by other carriers is removed, Exhibit 1 hereto illustrates a simplified arrangement of a customer and two users who share an intercity private line switched network. Each party's premise is connected to the shared switching system and intercity trunks by dedicated access lines. We believe the appropriate interpretation of the Commission's decisions cited herein would allow the customer to communicate with his own distant stations in all three cities or with the distant stations of any user he authorizes to share his private line service. However, each user may communicate only with the customer or that user's distant stations -- a user may not communicate with any other user (e.g., User A in Dallas may not communicate with User B in Chicago). A contrary result -- unlimited user to user connections -- is not explicitly prohibited by the filings of the other carriers, but such a system has the essential features of a public network.

5. A second example, shown in Exhibit 2 hereto, illustrates a similar arrangement, except instead of a customer and users, there are only users. Such a system configuration under unlimited resale, would have each user obtain

* Memorandum Opinion and Order, Southern Pacific Communications Company Tariff F.C.C. No. 6 (FCC 77-103), released February 16, 1977 and Memorandum Opinion and Order, MCI Telecommunications Corp., Revisions to Tariff F.C.C. No. 1 (FCC 77-104), released February 16, 1977.

access to the shared switching system and intercity trunks via a dedicated facility to his premise. He potentially need not have a premise or a dedicated access line in any other city, but could reach all other stations of all other users connected to the system. A proper interpretation of the Commission's Order which preserves the private line character of this configuration, would allow each party to use the service only in the cities where it has dedicated access lines, but prohibit the connection of one user to dedicated access lines obtained by any of the other users. A contrary result, not explicitly prohibited by the tariff revisions filed by the other carriers, would give users the power to combine their ability and thus to access all telephones in numerous distant cities connectable to the system in such a manner as to blur, if not obliterate, any distinction between private line service and MTS.

6. It should be noted that the actual situation prevailing in response to the instant tariff provisions will involve many more users and switches than are shown in the above simple and uncomplicated examples. With a proliferation of the number of different users or customers sharing a switching system, if such users and customers have almost unlimited ability to combine their access to switching systems and one another's telephones, the distinction between private line services and public message services will be obliterated. These capabilities under the carriers' filings require that the permissible and impermissible use of private line service

should be made explicit in the subject filed tariffs. At present, we are concerned that ambiguity exists.

7. AT&T, in its tariff filing on March 23, 1977, sought to comply with the Commission's Order in all respects. The following two regulations in particular address the above problems:

"2.2.2(C) Switched private line service furnished for voice or alternate voice communications may be used:

- (1) By the customer for communications between stations of the same customer;
- (2) By the customer for communications between stations of the same customer and a user connected to the service;
- (3) By the user for communications between stations of that user and that customer;
- (4) By a given user for communications between stations of the same user.

"2.2.5 Resale or sharing of a private line service may not encompass the conversion of that private line service to local exchange service, message telecommunications service, wide area telecommunications service or the equivalents thereof."

These regulations, which have no counterparts in the tariffs of other filing carriers, serve to restrict, where appropriate, the uses of the service to those specified by the Commission in its decisions.

8. The importance of maintaining the private line character of the service offered has been addressed by the Commission not only in this docket and in Execunet,* but also in the recent SPRINT and SPLS decisions.**

* MCI Telecommunications Corp., 60 F.C.C.2d 25 (1976), petition for review pending sub. nom. MCI Telecommunications Corp. v. FCC, No. 75-1635 (D.C. Cir.).

** Id. page 5.

There the Commission made it clear that its Specialized Common Carrier decision* contemplated only private line services which would compete with telephone company private line services and would not compete directly with or directly divert traffic and revenues from the public message services. The generalities of the tariffs filed make it impossible to determine whether the overriding objectives of the Commission are being observed rather than subverted. This can only be determined by a thorough investigation.

9. The above areas suggested for investigation are merely illustrative and highlight the fact that these tariffs perpetuate, and in some cases aggravate, some of the problems raised by AT&T and others in their pleadings filed in the Resale and Sharing case concerning misuse and misinterpretation of the Commission's orders therein. There are also additional areas which may be appropriate for consideration by the Commission in its investigation of the tariffs filed herein, such as uniformity of interpretation of the Commission's decisions as applied to international services and the economic impact of the implementation of the Commission's decisions. Moreover, there is also a danger that, unless specifically proscribed, there may be attempts to share exchange services by connecting them to shared intercity networks, in violation of the Commission's intent** and intrastate

* Docket No. 15920, 29 F.C.C.2d 870 (1971), aff'd sub nom. Washington, Utilities and Transportation Comm. v. FCC, 513 F.2d 1142 (9th Cir. 1975), cert. denied, 423 U.S.

** See, the SPRINT and SPLS decisions, supra note page 5.

tariffs. Clearly, the Commission should scrutinize the tariffs of other carriers and, for the reasons set forth herein, satisfy itself through the investigation process that its determinations in Resale and Sharing are being effectuated in all respects.

10. The Commission recognized that the relief requested herein will be necessary and appropriate when in denying AT&T's request for a stay pending judicial review in this docket, it stated:*

"We also have the statutory authority to suspend the new tariffs for up to five months thereafter [June 21, 1977], if such action shall be called for in light of any specific provisions of the tariff."

Suspension would permit the Commission time to assure itself that the carriers have achieved the proper balance in their tariffs as was attempted to be achieved by the Commission in its orders. In this connection, it should be noted that AT&T in its letter transmitting its tariffs herein, suggested the advisability of investigation of those tariffs if the Commission was uncertain as to their lawfulness. In these circumstances, it is submitted that the interests of all parties and the public would be served by suspending the instant tariff provisions for the full statutory period and ordering the investigation requested herein.

* Memorandum Opinion and Order (FCC 77-159, released March 14, 1977) (para. 3)

WHEREFORE, AT&T requests that the tariffs filed pursuant to the Commission's decision in Docket No. 20097 be set for investigation to determine whether such tariffs comply in all respects with the Commission's decisions in this docket and, pending such investigation, the tariffs be suspended for the full statutory period.

Respectfully submitted,

AMERICAN TELEPHONE AND TELEGRAPH COMPANY

By /s/Alfred A. Green
Alfred A. Green

By /s/J. Robert Fitzgerald
J. Robert Fitzgerald

By /s/Michael J. Goldey
Michael J. Goldey

195 Broadway
New York, New York 10007

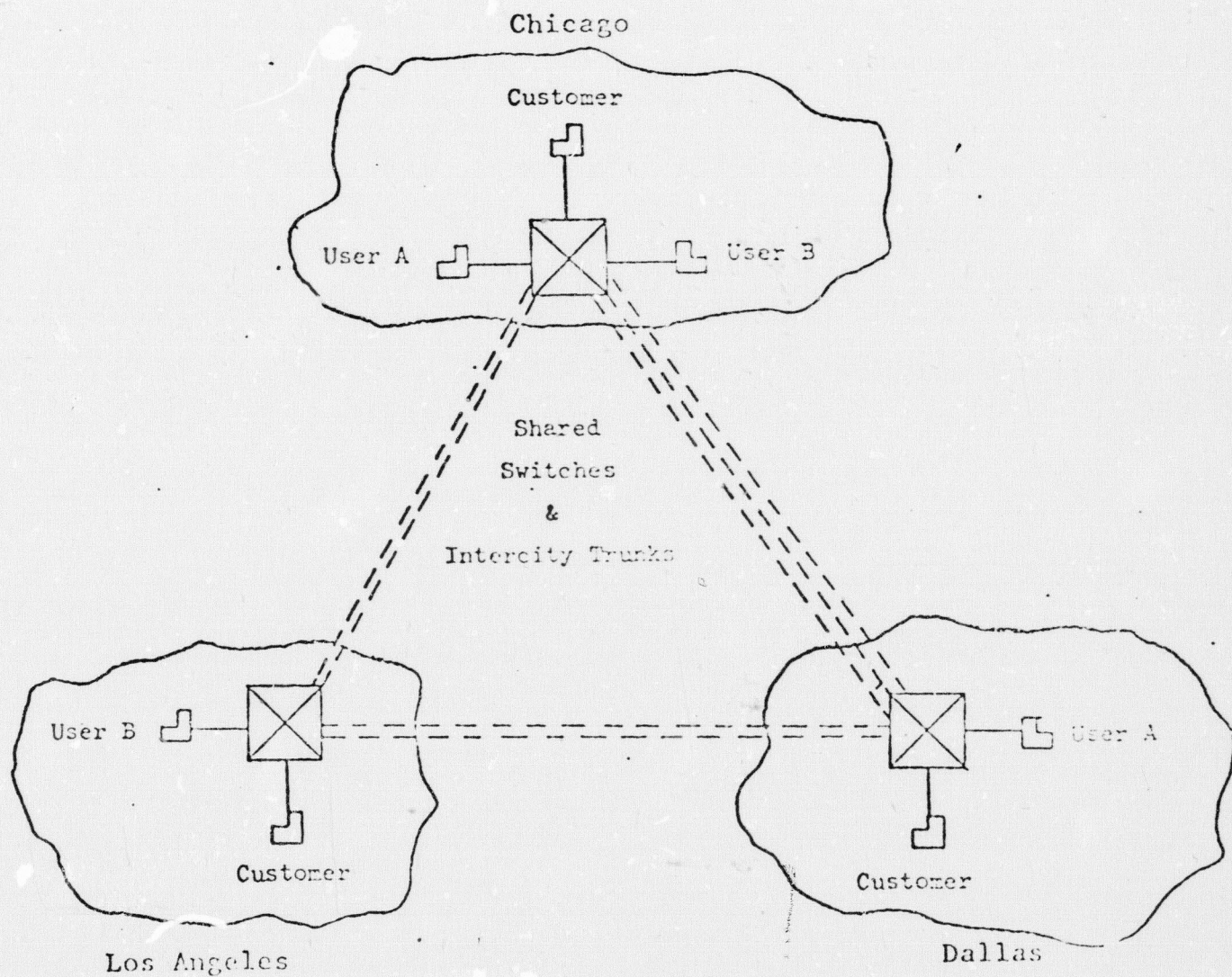
By /s/Edgar Mayfield
Edgar Mayfield

Routes 202-206, Rm. 4B-112
Bedminster, New Jersey 07921

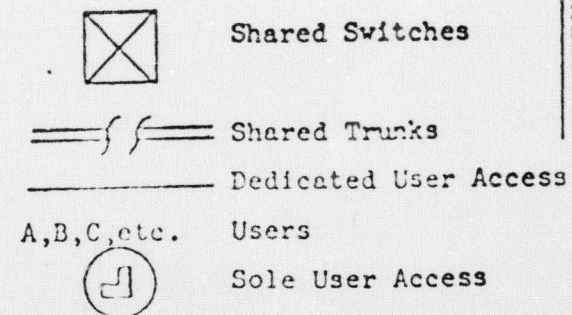
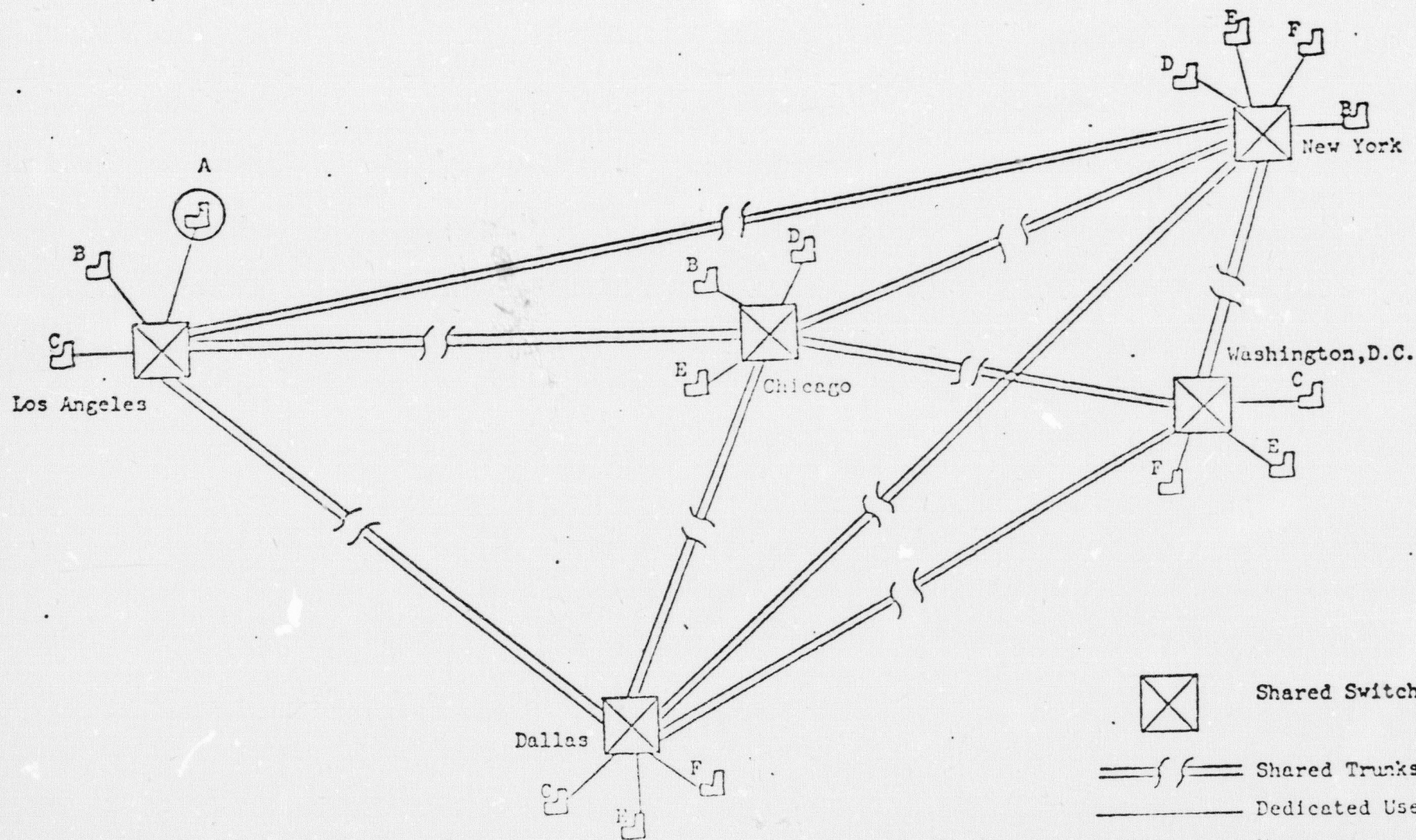
Its Attorneys

April 18, 1977

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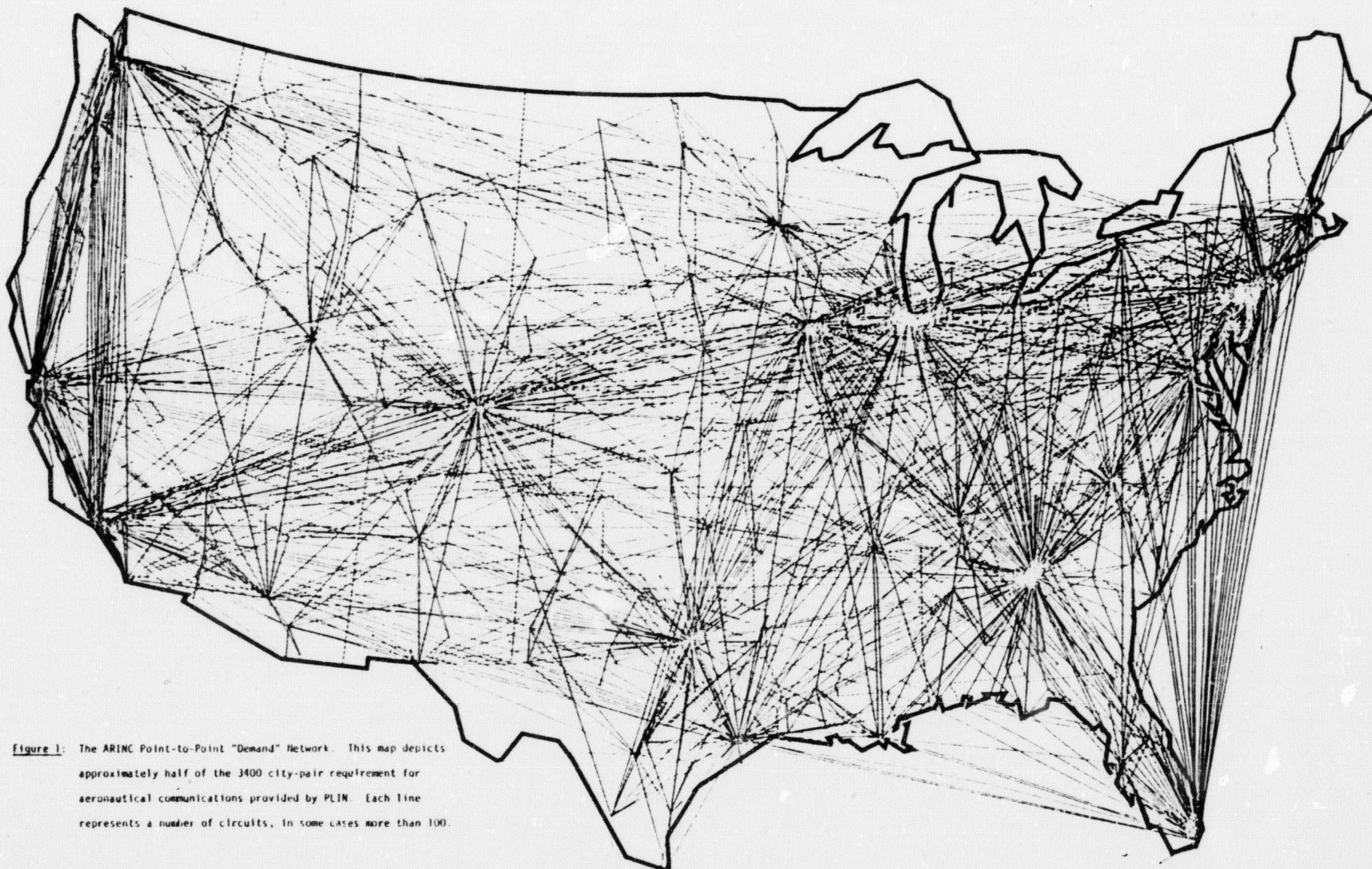
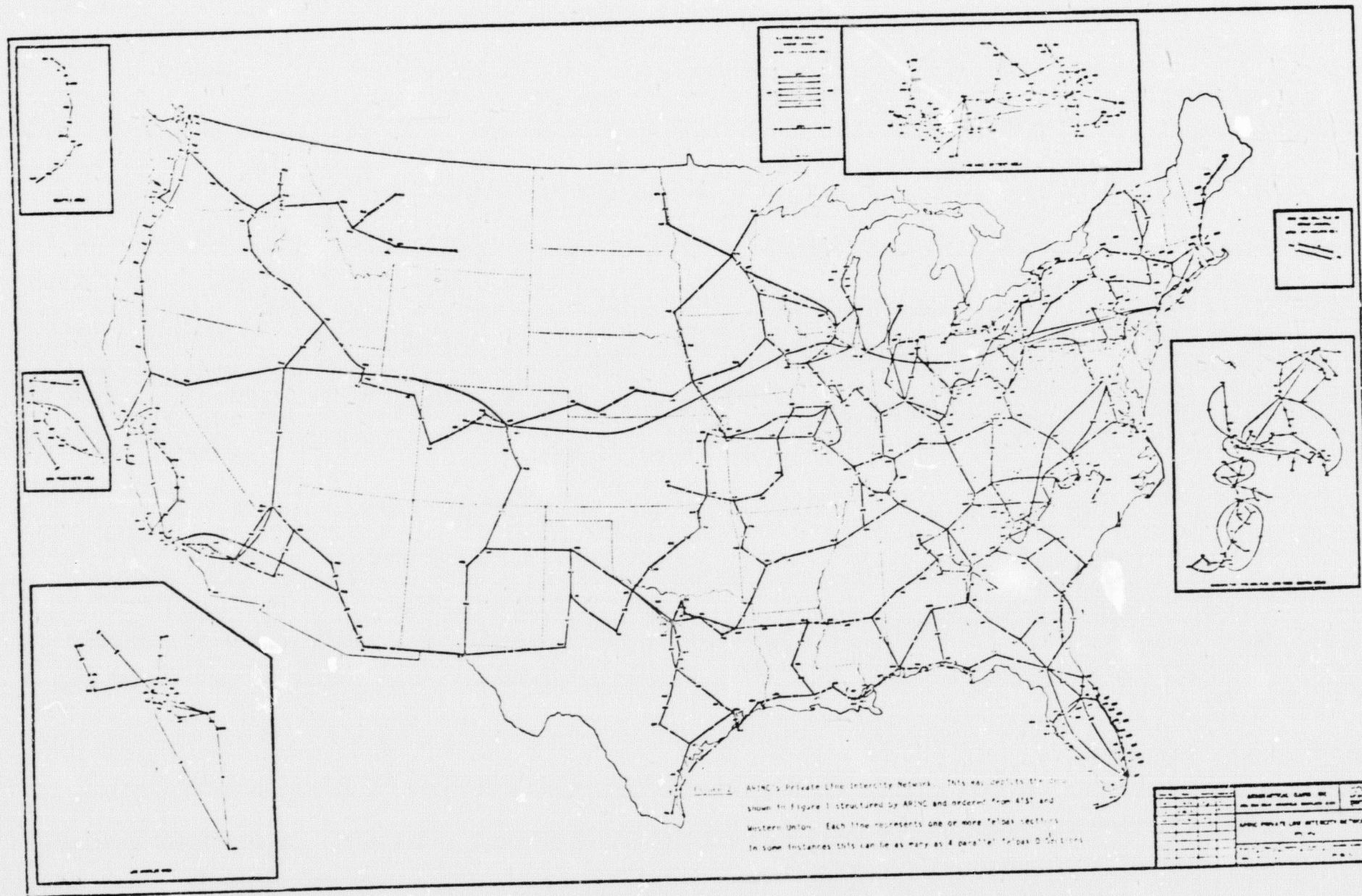


Figure 1: The ARINC Point-to-Point "Demand" Network. This map depicts approximately half of the 3400 city-pair requirement for aeronautical communications provided by PLIN. Each line represents a number of circuits, in some cases more than 100.



CERTIFICATE OF SERVICE

I, Arthur Blooston, a member of the bar of this Court, hereby certify that on the 17th day of May, 1977, a copy of the attached Brief for Intervenor, American Trucking Associations, Inc. in No. 77-40571 et al, was served by first class United States mail, postage prepaid, to the persons on the attached list.

Arthur Blooston

Arthur Blooston

Exhibit F

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	100
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Service List for Consolidated Case Nos.
77-4061, 77-4063, 77-4073, 77-4074 and 77-4075

Charles Lister, Esq.
Covington & Burling
888 - 16th Street, N.W.
Washington, D.C. 20006
(For American Telephone & Telegraph Co.)

Herbert E. Marks, Esq.
Stephen R. Bell, Esq.
Wilkinson, Cragun & Barker
1735 New York Avenue, N.W.
Washington, D.C. 20006
(For RPSS of ADAPSO)

Joel Yohalem, Esq.
1828 L Street, N.W., Suite 1001
Washington, D.C. 20036
(For Western Union Telegraph Company)

William J. Byrnes, Esq.
Haley, Bader & Potts
1730 M Street, N.W.
Washington, D.C. 20036
(For MCI Telecommunications Corp. et al.)

Charles M. Meehan, Esq.
Carole C. Harris
Keller & Heckman
1150-17th Street, N.W., Suite 1000
Washington, D.C. 20036
(For Utilities Telecommunications Council)

James E. Landry, Esq.
1709 New York Avenue, N.W.
Washington, D.C. 20036
(For Air Transport Association of America)

Donald E. Ward, Esq.
1050 - 17th Street, N. W.
Washington, D. C. 20036
(For Telenet Communications Corporation)

Charles R. Cutler, Esq.
Kirkland, Ellis & Rowe
1776 K Street, N.W.
Washington, D.C. 20006
(For Aeronautical Radio, Inc.)

Mahlon M. Frankhauser
Kirkland, Ellis & Rowe
1776 K Street, N.W.
Washington, D.C. 20006
(For Securities Industry Automation Corp.)

Robert E. Conn, Esq.
One WUI Plaza
New York, New York 10004
(For Western Union International, Inc.)

Wayne V. Black, Esq.
Larry S. Solomon, Esq.
Keller and Heckman
1150 - 17th Street, N.W.
Washington, D.C. 20036
(For American Petroleum Institute)

Aloysius B. McCabe, Esq.
Kirkland, Ellis & Rowe
1776 K Street, N.W.
Washington, D.C. 20006
(For American Newspaper Publishers Ass'n, et al.)

J. Roger Wollenberg, Esq.
Wilmer, Cutler & Pickering
1666 K Street, N.W.
Washington, D.C. 20006
(For International Business Machines Corp.)

Joseph M. Kittner, Esq.
Edward R. Taptich, Esq.
Virginia Carson
McKenna, Wilkinson & Kittner
1150-17th Street, N.W.
Washington, D.C. 20036
(For CBEMA)

John S. Voorhees, Esq.
Howrey & Simon
1730 Pennsylvania Avenue, N.W.
Washington, D.C.
(For CBEMA)

John Ingle, Esq.
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554
(For the Federal Communications Commission)

Robert Nicholson, Esq.
United States Department of Justice
Washington, D.C. 20530
(For the United States of America)

Robert F. Potter, Esq.
Patterson, Belknap, Webb & Tyler
30 Rockefeller Plaza
New York, New York 10020
(For Dow Jones & Company, Inc.)

John R. Baskin, Esq.
Baker, Hostettler & Patterson
1956 Union Commerce Building
Cleveland, Ohio 44115
(For United Press International, Inc.)

Lawrence Kill, Esq.
Anderson, Russell, Kill & Olick
Rockefeller Center, 630 Fifth Avenue
New York, New York 10020
(For United System Service, Inc.)

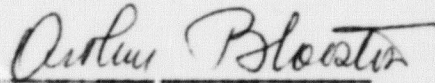
Carolyn C. Hill
1800 K Street, N.W., Suite 1102
Washington, D.C. 20006
(For United System Service, Inc.)

Howard G. Kristol, Esq.
Reboul, MacMurray, Hewitt, Maynard & Kristol
75 Rockefeller Plaza
New York, New York 10019
(For Southern Pacific Communications Company)

Herbert E. Forrest, Esq.
Steptoe & Johnson
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
(For Southern Pacific Communications Company)

CERTIFICATE OF SERVICE

I, Arthur Blooston, a member of the bar of this Court, hereby certify that on the 25th day of May, 1977, copies of the attached brief for Intervenor, American Trucking Associations, Inc., in No. 77-4057, et al., filed pursuant to Rule 32(a), Federal Rules of Appellate Procedure, were served by first class United States mail, postage prepaid, on the persons on the attached list.



Arthur Blooston

Service List for Consolidated Case Nos. 77-4057,
77-4067, 77-4068, 77-4073, 77-4074 and 77-4075

Charles Lister, Esq.
Covington & Burling
888 - 16th Street, N.W.
Washington, D.C. 20006
(For American Telephone & Telegraph Co.)

Herbert E. Marks, Esq.
Stephen R. Bell, Esq.
Wilkinson, Cragun & Barker
1735 New York Avenue, N.W.
Washington, D.C. 20006
(For RPSS of ADAPSO)

Joel Yohalem, Esq.
1828 L Street, N.W., Suite 1001
Washington, D.C. 20036
(For Western Union Telegraph Company)

William J. Byrnes, Esq.
Haley, Bader & Potts
1730 M Street, N.W.
Washington, D.C. 20036
(For MCI Telecommunications Corp. et al.)

Charles M. Meehan, Esq.
Carole C. Harris
Keller & Heckman
1150-17th Street, N.W., Suite 1000
Washington, D.C. 20036
(For Utilities Telecommunications Council)

James E. Landry, Esq.
1709 New York Avenue, N.W.
Washington, D.C. 20036
(For Air Transport Association of America)

Donald E. Ward, Esq.
1050 - 17th Street, N. W.
Washington, D. C. 20036
(For Telenet Communications Corporation)

Charles R. Cutler, Esq.
Kirkland, Ellis & Rowe
1776 K Street, N.W.
Washington, D.C. 20006
(For Aeronautical Radio, Inc.)

Mahlon M. Franklauser
Kirkland, Ellis & Rowe
1776 K Street, N.W.
Washington, D.C. 20006
(For Securities Industry Automation Corp.)

Robert E. Conn, Esq.
One WUI Plaza
New York, New York 10004
(For Western Union International, Inc.)

Wayne V. Black, Esq.
Larry S. Solomon, Esq.
Keller and Heckman
1150 - 17th Street, N.W.
Washington, D.C. 20036
(For American Petroleum Institute)

Aloysius B. McCabe, Esq.
Kirkland, Ellis & Rowe
1776 K Street, N.W.
Washington, D.C. 20006
(For American Newspaper Publishers Ass'n, et al.)

J. Roger Wollenberg, Esq.
Wilmer, Cutler & Pickering
1666 K Street, N.W.
Washington, D.C. 20006
(For International Business Machines Corp.)

Joseph M. Kittner, Esq.
Edward R. Taptich, Esq.
Virginia Carson
McKenna, Wilkinson & Kittner
1150-17th Street, N.W.
Washington, D.C. 20036
(For CBEMA)

John S. Voorhees, Esq.
Howrey & Simon
1730 Pennsylvania Avenue, N.W.
Washington, D.C.
(For CBEMA)

John Ingle, Esq.
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554
(For the Federal Communications Commission)

Robert Nicholson, Esq.
United States Department of Justice
Washington, D.C. 20530
(For the United States of America)

Robert F. Potter, Esq.
Patterson, Belknap, Webb & Tyler
30 Rockefeller Plaza
New York, New York 10020
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John R. Baskin, Esq.
Baker, Hostettler & Patterson
1956 Union Commerce Building
Cleveland, Ohio 44115
(For United Press International, Inc.)

Lawrence Kill, Esq.
Anderson, Russell, Kill & Olick
Rockefeller Center, 630 Fifth Avenue
New York, New York 10020
(For United System Service, Inc.)

Carolyn C. Hill
1800 K Street, N.W., Suite 1102
Washington, D.C. 20006
(For United System Service, Inc.)

Howard G. Kristol, Esq.
Reboul, MacMurray, Hewitt, Maynard & Kristol
75 Rockefeller Plaza
New York, New York 10019
(For Southern Pacific Communications Company)

Herbert E. Forrest, Esq.
Steptoe & Johnson
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
(For Southern Pacific Communications Company)

